

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE:

B-216713

DATE: March 18, 1985

MATTER OF:

Simpson Electric Company

DIGEST:

Protest against a nonresponsibility determination is sustained where the contracting officer's basis is completely unsubstantiated and the protester has shown that the purported delinquency rate on which it is based is incorrect, and has been recognized by the procuring agency to be substantially better.

Simpson Electric Company (Simpson) protests the award of a contract for voltmeters under request for proposals (RFP) No. DAAJ10-84-R-A078 issued by the United States Army Troop Support Command, St. Louis, Missouri (Army). Simpson asserts that it was improperly prohibited from competing because of a premature and unsupported nonresponsibility determination.

We sustain the protest.

The procurement was negotiated because it was for a source-restricted item, for which it was impracticable to obtain competition. The RFP called for a base quantity of 9,132 voltmeters, with an option for the same quantity. The evaluation criteria incorporated by reference a provision of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.217-5 (1984), which provides for award on the basis of the total price for the basic requirement plus the total option quantity. The Army has made it apparent that although the procurement was negotiated, price was the only evaluation factor since only approved source suppliers were competing.

Simpson submitted an offer of \$14 per unit for both the base requirement and the option quantity. Phaostron Instruments (Phaostron) submitted an offer with a price of \$13.93 per unit for the base requirement and \$14.20 per unit for the option quantity. Two other companies submitted substantially higher prices. In its report, the Army contends that since only 808 units were exercised at the time of award under the option provision, Phaostron was the low evaluated offeror at a total price of \$138,682.36, compared

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to Simpson's total of \$139,160. In fact, under the RFP evaluation clause, Simpson's offer properly should have been evaluated as \$255,696 (equal to 18,264 units at \$14 each), and Phaostron's offer should have been evaluated as \$256,883.16 (equal to 9,132 units at \$13.93 and 9,132 units at \$14.20). Thus, under the terms of the RFP, Simpson was the low offeror.

Because of the closeness of the two offers, the Army determined to "pre-award" both companies. Apparently because of time constraints, the contracting officer decided to conduct a desk audit rather than a preaward survey. The contracting officer determined on the basis of this desk audit that Phaostron was responsible and Simpson was nonresponsible. The contractor evaluation summary (which is the only basis for this determination) for Phaostron states:

"Very good contractor. Past performance shows 24 contracts, 5 delinquent 3 less than 30 days. Delivery adequate. Recommend award... Remarks: Based on DCAS comments and records in this office, recommend award."

The contractor evaluation summary for Simpson states:

"DCAS stated a delinquency rate of 40% for the current year and 55% on in house contracts...Remarks: Based on DCAS report of 40% delinquency for the current year and 55% on in house contracts. Recommend no award based on above remarks and (FAR) guidance on contracting with poor performance."

Based on this summary, on August 2, 1984, the contracting officer determined Simpson nonresponsible. The contracting officer's determination also states that Simpson is a small business firm and suggests that since DCAS records showed a high delinquency record, no further action was necessary. In fact, Simpson is a large business, and so certified on its offer.

Subsequently, the Army determined that it had another requirement for 1,162 voltmeters which were identical items with a different National Stock Number. By amendment dated September 4, 1984, the activity added this requirement and requested best and final offers for the new requirement. Prior to issuing the amendment, the contracting officer determined that because of the prior nonresponsibility determination, he would send notice to all the previous offerors, except Simpson, which he deliberately excluded.

In response, the Army indicates that the record consists of the above-referenced contractor assessment report which purportedly reflects telephone information provided by DCASMA, Chicago.

In addition, Simpson states that a subsequent preaward survey was performed by DCASMA in November 1984. In response to our request to provide information regarding this survey, the Army responded that no such preaward survey was conducted, but that a delinquency followup report was conducted during this time frame, which resulted in a finding that Simpson was delinquent on 28 percent of its contracts. The Army has provided no documentation for this assertion. Simpson has provided us with a copy of a letter dated November 6, 1984, from DCASMA, Chicago, which references the fact that DCASMA was conducting a preaward survey of Simpson in conjunction with the solicitation at issue in this protest, and requests certain documented financial information from Simpson. Simpson also states that it has been advised by DCASMA, Chicago, that it received a favorable recommendation as the result of this survey.

In our view, Simpson has provided substantial documentation which supports all of its assertions regarding both its high level of performance and the actual action taken by DCASMA. By contrast, the Army's documentation does not support its assertions; in effect, the only documentation it has is a record of a purported telephone conversation reporting delinquency percentages, unsupported by actual numbers, and which is contradicted by later information provided by the Army with respect to the delinquency percentages. Under these circumstances, we believe that the contracting officer's non-responsibility determination with respect to Simpson had no reasonable basis. See Dyneteria, Inc., B-211525, supra; Consolidated Airborne Systems, Inc., 55 Comp. Gen. 571 (1975), 75-2 C.P.D. ¶ 395.

Accordingly, we sustain the protest.

We have been advised by the Army that Phaostron has delivered approximately 1800 units to date under Contract Line Item Numbers (CLINs) 1 and 2, and is delivering at a rate of approximately 800 units per month through the end of this year. Since the contract calls for a total of at least 9,132 units, we recommend that this award be terminated for convenience and award of the balance of the contract quantity be made to Simpson. Since A & M has virtually completed performance under the contract for CLIN 3, with final delivery to be made on March 15, no corrective action is possible with respect to this CLIN.


In response to this amendment, Phaostron offered the same prices for the initial requirement and a unit price of \$12.75 for the additional requirement. A & M Instruments, Inc. (A & M), offered the new requirement at a unit price of \$12.50. The Army determined to award the initial requirement to Phaostron, and the later requirement to A & M. By letter dated September 20, 1984, Simpson was advised of this award. After inquiry to the Army about the basis for award, Simpson protested to our Office.

Simpson protests that the Army is required under the FAR to conduct a full preaward survey, not simply a desk audit, that the Army's delinquency figures are completely inaccurate and without any basis, and that Simpson was prematurely eliminated from competition by the Army's exclusion of Simpson from receipt of the notice of the additional requirement and the final request for best and final offers. As evidence of its contract performance record, Simpson has submitted documentation from the Defense Logistics Agency (DLA), which gave Simpson a Contractor Assessment Program (CAP) award for all of 1982 on the basis of in-plant evaluations by government personnel of excellence in the quality of products and services provided. Simpson states that this award is based on its 98 percent performance rating, which is the correct figure. In addition, Simpson asserts that it would have been the low offeror for the additional requirement if it had been provided with a copy of the amendment and given the same opportunity to compete as the other offerors.

The Army is correct that under FAR, 48 C.F.R. § 9-105.1(b)(1), the contracting officer is not obligated to conduct a preaward survey, and could rely on a desk audit instead. Manufacturing Systems International, Inc., B-212173, May 30, 1984, 84-1 C.P.D. ¶ 586. However, the contracting officer does not have unbridled leeway in making a nonresponsibility determination. Although the contracting officer does have a wide degree of discretion and business judgment in making a determination of an offeror's responsibility, there must be a reasonable basis for a negative determination. Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 C.P.D. ¶ 654.

Simpson points to the DLA CAP award which it received (and a similar award for the prior year) as evidence that it has a 98 percent acceptable or better performance record, and thus does not have a high delinquency rate. Simpson asserts that the Defense Contract Administration Services Management Area (DCASMA), Chicago, is in agreement with its position and that the Army's figures are simply erroneous. At a conference on the protest, we asked the Army to provide whatever objective evidence it had available to support the figures.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States